stability of titles, that we should not, for light causes, depart from the general rule of construction, which, under a bequest or devise to "*heirs*," gives the estate to those who answer that description at the death of the testator.

It is ordered and decreed, that the decree of the Court below, ordering the decree of the 12th February, 1850, to be so amended "that the complainants (below) receive from the executor of the testator the sum of $74,00\frac{3}{4}$, with interest from the 12th February, 1850," be reversed.

And it is further ordered and decreed, that the decree of the 12th February, 1850, be affirmed.

Supreme Court, Pennsylvania, September, 1852.

THE NEW YORK AND ERIE RAILWAY, *v.* SKINNER.

1. An action on the case for negligently conducting a Railway train may be maintained; as to what constitutes negligence, *quaere.*
2. A Railway Company is a purchaser for valuable consideration of the exclusive use of the land, over which the track is laid, as an incorporeal hereditament, and may use thereon the greatest allowable rate of speed, without interference from strangers.
3. By the common law of Pennsylvania, as well as by the common law of England, the owner of cattle is bound to keep them within his own custody at his peril, though he may let them go at large without incurring liability from entry on unenclosed woodland or waste field, and this because of the peculiar circumstances of the people here.
4. A judge's charge to a jury must be accurate, not only in its outline, but also in its detail, or this court will reverse on error.
5. The principle in Simpson *v.* Hand, 6 Whart. 311, affirmed and enforced.
6. A Railway Company is responsible only for negligence or wanton injury, and the owner of cattle killed or injured on their track, can have no recourse to the Company or its servants;—and such owner is liable for damages done by his cattle to the Company or its passengers.

Error to the Court of Common Pleas, of Susquehanna County.

The plaintiff below declared against the defendant, in trespass on the case, alleging that in consequence of the negligence of the de-

fendant's servants in conducting and running their engine and cars on their railway track, the engine ran upon and over a cow of the plaintiff, and killed her.

It appeared on the trial that the cow in question was at large, on a narrow piece of unenclosed land, between the railroad of defendant and the public highway, about sunset of one day in May or June, 1849, when the mail train came along, running up to their regular time of twenty-five to thirty miles per hour. When about one hundred yards distant, the cow was seen and the whistle was sounded, the engine reversed, and signal given to brake; but the cow sprang on the track and the engine ran on to her, and one or two cars were thrown partly off the track.

Defendant's counsel requested the Court to charge the jury "that if they believe that the plaintiff's cow was suffered to stray upon the public highway, and that from thence she came upon the railroad track of the defendant, and was there run over and killed by their locomotive engine, the plaintiff cannot recover, even though there were negligence on the part of the defendant.

"That the plaintiff's cow, under the evidence in this cause, was trespassing on the land and railroad track of the defendant, and therefore the plaintiff cannot recover, even though there were negligence on the part of the defendant."

The Court, JESSUP P. J., declined to charge as requested, and this was assigned as error.

Mr. J. T. Richards, for the plffs. in error, cited *Fort* v. *Wisnell*, 14 Johns. 304, *Plater* v. *Scott*, 6 G. & J. 116, *Travis* v. *Smith*, 1 Barr. 234, *Bush* v. *Brainard*, 1 Cow. 78, *Rust* v. *Low*, 6 Mass. 94, *Vanderplank* v. *Miller*, M. & M. 169, *Barnes* v. *Cole*, 21 Wend. 188, *Rathbun* v. *Payne*, 19 Id. 399, *Wynn* v. *Allard*, 5 W. & S. 524, *Simpson* v. *Hand*, 6 Whart. 320, *Tona. R. R.* v. *Munger*, 5 Denio, 255, *Knight* v. *Abert*, 6 Barr. 472.

September 27, 1852. The opinion of the Court was delivered by

GIBSON, J.—An action for such an injury as is laid in this declaration, is founded on negligence, of which there was not a particle of proof at the trial. The company was using its chartered privilege in

the usual way, and its act was lawful. Doubtless an action on the case may be maintained for negligence in conducting a railway train as well as in conducting any other vehicle, as was ruled in *Bridge* v, *The Grand Junction Railway*, 3 M. & W. 244; but what is such negligence has not been entirely determined. In *Aldridge* v. *The Great Western Railway*, 4 Scott, N. R., 150, S. C., 1 Dowl, N. S. 247, an action was maintained for suffering sparks to fly from the engine to a bean stack; and this is all we have for it in the shape of decision. No doubt a company is answerable for gratuitous damage, but what evidence was there of such damage in this case? Absolutely none. The testimony is consistent, and it shows that the train was going at the usual speed: that it was within three hundred feet of the spot where the cow jumped suddenly from the ditch to the track: that the engine was instantly reversed, and the signal given to brake; and that alacrity could do no more. The retropulsive power at the disposal of the engineer was applied in vain. Had he been able to stop the train in time to save the cow, he could not have done it without periling the passengers. Granting what one of the witnesses testified, that the cow might have been seen at the distance of fifty rods by the way side, and granting that the train might have been stopped within it; yet the engineer was not bound to stop it.[1] He had no reason to apprehend that she would leap into the jaws of death, or that it was necessary to anticipate her.

But high above this stands the impregnable position, that a railway company is a purchaser, in consideration of public accommodation and convenience, of the exclusive possession of the ground paid for to the proprietors of it, and of a license to use the greatest allowable rate of speed, with which the person nor property of another may interfere. The company on the one hand, and the people of the vicinage, on the other, attend respectively to their particular

[1]See a curious case in North Carolina, Herring *v.* the Wilm. and Ral. Rail Road Co., 10 Ired. 402, where *two slaves*, who were lying asleep across the track, were killed by an engine passing over them. It was held that the fact of the killing did not raise a presumption of negligence; for inasmuch as the slaves were reasonable beings, the driver of the engine might presume they would get out of the way.—*Eds. Am. L. Reg.*

concerns, with this restriction of their acts, that no needless damage be done. But the conductor of a train is not bound to attend to the uncertain movements of any assemblage of those loitering or vagabond cattle, by which our railways are infested. Any other rule would put a stop to the advantages of railway travelling, altogether. And, for what deprive the country of one of the best improvements of this most wonderful age? For no more than to enable a few unpastured cows to pick up a scanty subsistence in waste fields and lanes. If the bullocks, cows, horses, sheep, or swine of the neighborhood, were allowed to block the way, the prohibition of intrusion by drovers or travellers using their own means of conveyance, would be of little use. For the sake of the company and the passengers, the conductor and subordinates will be vigilant to remove obstructions; but the protection of the property is merely incidental. If the owner of it do not attend to it, the company's servants, having their own business to mind, are not bound to do so; and he who trusts his property to the chances of accident, is bound to stand the hazard of the die. *Knight* v. *Abert*, 6 Barr. 472, is to the point. In that case the intrusion was on wood land; in this it was on the exclusive possession of ground paid for as an incorporeal hereditament.

So far, we have treated the case as if the plaintiff's skirts were clear; but they are not. By the Common Law of England, an owner of cattle is bound to keep them in an enclosure, or in custody, at his peril; for every entry by them on another's possession, is a trespass; by the Common Law of Pennsylvania, he may let them go at large without incurring liability for an entry by them on woodland or a waste field.—To entertain an action for inappreciable injury, would encourage vexatious and unprofitable litigation, and be contrary to the maxim *de minimis*, which is peculiarly appropate to the circumstances of the people here. But if such an intrusion would occasion substantial damage, the English rule would be applicable to it, on the principle that the owner of a bull which has gored another's ox, must pay for it. Is not the intrusion of an animal on the railway, which has a direct tendency to throw a train

off the track and endanger life and member, an injury to persons involved in the risk? It is conceded that an American company is not bound to fence its railway, as an American farmer is bound to fence his fields, and this shows that persons who suffer their cattle to go upon it, do so on their own responsibility. Every English railway is fenced—not to protect it from cattle, for none are at large; but to prevent detriment or detention from other causes. In a country so new and so sparse as ours, of which the trunks of the principal railways are more extensive than the Island of Great Britain, the cost of fencing them would be greater than could be borne. The rights and responsibilities of a people are shaped by the circumstances of their condition. If they will have railways, they must be content to have them in the only way they are practicable: and the English rule must be applicable to them. If an owner suffer his cattle to be at large, it must be at the risk of losing them or paying for their transgressions. The very act of turning them loose, is negligence, as regards any one but an owner of a forest or waste fields; and the owner of them is consequently responsible to every one else. That he is not answerable for them to a railway company criminally, like a caitiff, who has laid a log or a bar across the track, is because mischief was not intended by him. But no prudent man in his predicament, would be the first to make a stir about it.

The charge was accurate in its outline, but not in its detail. As has already been said, there was no evidence of negligence on the part of the defendant, yet the existence of it was left to the jury as a debatable matter. In another part, he even took the fact for granted. "The simple fact," he said, "of permitting for a limited time, the cow to wander on the Railroad, would not of itself, be such negligence as to excuse all negligence on the part of the defendant." Had there been evidence to raise the point, the direction might have been well enough; but the application of the principle in the particular instance, was wrong. In *Sills* v. *Brown*, 9 C. & P. 605, it was ruled that in cases of accident with carriages or ships, mutual negligence, *if contributive to the injury*, bars an action

for it—a principle enforced by this court in *Simpson* v. *Hand*, 6 Whart. 311.—But it was erroneous to predicate it of a case in which the negligence was all on the side of the plaintiff. He further charged, "that if the plaintiff *knew* his cow was wandering on the railroad, it was his duty to drive her therefrom. He had no right to suffer her to be there; and if he suffered it, knowing her to be there, he was guilty of such negligence as would prevent his recovering. But if his cow casually wandered away, ordinary care being used to restrain her, the simple fact of her being on the track would not excuse the defendant's negligence." Now the making of this gratuitous imputation of negligence and the ignorance of the cow's whereabout, turning points of the cause, is the root of the error. As loss of the property is not a penalty for the owner's supineness in the care of it, of what account is his ignorance of its jeopardy.

The irresponsibility of a railway company for all but negligence or wanton injury, is a necessity of its being. A train must make the time necessary to fulfil its arrangements with the Post Office and the passengers, and it must be allowed to fulfil them at the sacrifice of secondary interests put in its way; else it could not fulfil them at all. The maxim of *Salus populi* would be inverted; and the paramount affairs of the public would be postponed to the petty concerns of individuals. Every obstruction of railway is unlawful, mischievous and abatable at the cost of the owner or the author of it, without regard to his ignorance or intention. It may seem cruel to make a dumb beast suffer for the fault of its owner; but it must be remembered that the lives of human beings are not to be weighed in the same scales with the lives of a farmer's or a grazier's stock; and that their preservation is not to be left to the care which a man takes of his uncared-for cattle. Allowing them to prowl for their food, he may not wash his hands of the consequences of it. In a country so obnoxious to the charge of indifference to human safety, it is a high and holy charge of the Courts to hold to their duty, not only those to whom it is immediately committed, but also those by whose defaults it may be remotely endangered; and to hold them hard. We are of opinion that an owner of cattle killed or injured on a railway, has no recourse to

the company or its servants; and that he is liable for damage done by them to the company or its passengers.

Judgment reversed.

NOTE.—According to the well and long established principles of the common law, the owner of a close is not obliged to fence against the cattle of the occupant of an adjoining close. Every man must keep his cattle on his own land, and prevent them from wandering on that of his neighbor. It is true, that no man is bound to fence his land, in the absence of statute regulation or prescription, against an adjoining field, but he is bound to keep his cattle upon his own close at his own peril, and a fence has been found the most convenient mode of so doing, and hence, in well settled districts in this country, even in the absence of statutes, has been generally adopted. Further, if a man be bound to make fences, his duty extends only as against his immediate adjoining neighbor, or some person having an interest in the contiguous close, but not as against strangers; and hence, if the cattle of a mere stranger escape into the close, from defect of fence, trespass lies.[1]

A man has a right to drive his cattle along the highway to market, or to and from his pasture ground; and in doing so, they may wander out of the lines of the road and get upon adjoining lands that are not protected by front fences; and perhaps such vagabond movements of the cattle would hardly amount to a trespass, or at any rate, would fall within the principle *de minimis;* or, if a litigious plaintiff should bring an action, he would recover only nominal damages. But, as between the landholder and a stranger, in the absence of statute regulation, or custom or covenant, the landholder is not subjected to the *onus* of putting up a fence to protect himself against the cattle of one living at a distance, whose land does not adjoin his own, and who chooses to pasture his cattle on the highway at the public expense and annoyance, and who does not choose to keep them on his own close. Between such landholder and cattle owner there is no mutuality that requires the former to protect himself against the latter, and the latter would undoubtedly be liable for every injury the cattle might commit, either in an action of trespass, or by distress *damage faisant.*[2]

[1] See the old books and cases cited in Rust *v.* Low, 6 Mass. R. 90.

[2] Chambers *v.* Mathews, 3 Harr. N. J. Rep. 368; Coxe *v.* Robbins, 4 Halst. 385; Lord *v.* Wormwood, 22 Maine, 282; Vandegrift *v.* Redeker, 2 Am. Law Jour. 118, S. C. 2 Zab. N. J. Rep. 183; Stafford *v.* Ingersoll, 2 Hill, N. Y. 38; Lyman *v.* Gibson, 18 Pick. R. 427; Dovasten *v.* Payne, 2 H. Black, 527; Rust *v.* Low, 6 Mass. 90; Stackpole *v* Healy, 16 Id. 33; Tonawanda R. R. *v.* Munger, 5 Denio, 267, per Beardsley, Ch. J.; Wells *v.* Howell, 19 Johns, 385; Bush *v.* Brainard, 1 Cow. R. 79, *note;* Clark *v.* Brown, 18 Wend. 213; Little *v.* Lathrop, 5 Greenl. R. 356; Gale and Whateley's Law of Easements, 297. The following general proposition is deduced by Judge Cowen, as the result of a careful examination of the authorities: "Every man is bound, under peril of being accounted a trespasser, to keep such animals as are the subject of absolute property, upon his own soil." See 1 Cow. Rep. 91 *note.*

It is said the common law on this subject has never been in force in Illinois, and that the owner of a close must have it fenced in order to maintain an action of trespass for injury done by cattle. See Seely *v.* Peters, 5 Gilman, 130. Caton, J., however, *dissented.*

If cattle trespass on improved land, which is not surrounded by a statute fence, the owner of the land may drive them off, and may set a dog upon them, providing he is not wanting in ordinary care and prudence, either in the size or character of the dog, or the manner in which he pursues them. Clark *v.* Adams, 18 Verm. 425.

The application of these principles to railways is not difficult. It is the duty, and it is a duty for which an action would lie, or an indictment might be found, of a railway company to construct their track and run their locomotives and cars over that track in such manner and at such speed as the wants of modern commerce and social improvement demand. And if in the progress of things, a new and powerful agent, such as steam, is subdued by man's genius to become a useful and active laborer in his behalf, all that can reasonably be required of one, who uses an agent so potent and so dangerous, is to exercise all reasonable skill to prevent injury to the property of third persons. Engines and cars in rapid motion are lawfully passing over their appointed pathway. This pathway is owned by the railway corporation, either in fee, or it is liable to a servitude or easement, which, practically, is the same thing. The land upon which the road is built, is as fully the property of the corporation as the land of an adjoining owner on which he grows his wheat, or mows his grass. And the same principles of law must be applied to each. In the absence of statutes or covenants, or prescription, the railway company is not bound to fence in their land, and in long lines of railway in a new and thinly peopled and ill timbered country, the expense would be intolerable and the outlay comparatively useless.[1] The owners of adjoining lands and strangers are bound to keep all cattle off the railway track, as much as they are bound to keep them off of each others farms; and should they fail so to do, they must respond in actions for all consequent injury.[2]

[1] It has been held in Maine, that the fact that a railroad company have built fences along the line of their track against the land of an adjoining property holder, is not of itself evidence of any obligation on the part of the corporation to either erect or maintain fences for the benefit of such adjoining landholder. Morse *v.* The Boston and Maine R. R. Co. 2 Cushm. 536.

[2] Vandegrift *v.* Redeker, 2 Am. Law Jour. 116, S. C. 2 Zab. 183; Tonawanda R. R. Co. *v.* Munger, 5 Denio, 258; Perkins *v.* The Eastern R. R. Co. 29 Maine, 307; Clark *v.* The Syracuse R. R. Co. 5 Month. Law Rep. 277; 11 Barb. Rep. S. C. "The railroad track, when appropriated, is not subject to the same rules as ordinary highways; the company has the exclusive use of the land for the purposes of their incorporation. The owner of the fee retains no right to the use or occupation of the ground for pasture or otherwise. The object and scope of the appropriation is wholly inconsistent with the owner retaining any rights or interests in the use of the land during the period for which it is appropriated." Per Bennett *arguendo*, 4 Comst. R. 356–7, and per Hurlbut, J., p. 357.